No. 12,492

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN W. GERBER,
Appellant,

vs.

JACK E. MOLESWORTH,
Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

This action was instituted in the United States District Court for the Northern District of California, Southern Division. The jurisdiction of that Court was based on diversity of citizenship, under the provisions of Title 28, U. S. Code, Judiciary and Judicial Procedure, Sections 1331 and 1332. Appellant, defendant below, is a citizen and resident of the State of California. Appellee, plaintiff below, is a citizen of the State of Massachusetts. The amount involved is in excess of $3,000.00. The case was tried to the Court without a jury. The Court entered a judgment for the appellee. (Tr. 24.)

This Court has jurisdiction of the appeal under the provisions of Section 1291 of Title 28, U. S. Code, Judiciary and Judicial Procedure.

STATEMENT OF THE CASE.

Stephen W. Gerber was a columnist for the "Weekly Philatelic Gossip", a stamp magazine. (Tr. 115-116.) His column was called "Pets and Peeves." (Tr. 55.) He received no compensation for articles written by him. (Tr. 116.)

It was conceded by both parties to the proceeding before the Honorable District Court and in effect stipulated, that the "Weekly Philatelic Gossip" was sold and distributed throughout the United States to stamp dealers, auctioneers, and persons interested or engaged in the stamp business. (Tr. 26-27.)

In 1947, appellee, Jack E. Molesworth, was advertising stamps for sale to dealers in the United States. (Tr. 36-37.) In response to these advertisements, on October 31, 1947, appellant, Stephen W. Gerber, ordered a stamp, catalogue Number 478, from the appellee. (Tr. 37.) The appellee accepted the order and forwarded a stamp, supposedly a Number 478. Examination of the stamp revealed that it was not a 478 but rather a cheaper stamp catalogued as Number 460. (Tr. 60-61.) The stamp was thereupon returned to appellee. (Tr. 38.)

(NOTE): All page references are to printed Transcript of Record unless otherwise noted.

Subsequently appellant received communications from various stamp dealers that appellee had sold a counterfeit stamp (Tr. 122) and that appellee's returns to these dealers in various transactions were excessive and not justified. (Deposition of Arthur Margulies 22, 23; Deposition of M. Ohlman pp. 4-5, 6-7; Deposition of Hyman Bedrin p. 28; Defendant's Exhibit D; Defendant's Exhibit E, Tr. 122, 118, 119, 125, 126, 135.)

On October 30, 1948 an article written by appellant appeared in the "Weekly Philatelic Gossip". The text is as follows:

> "What's a Mole Worth? Actually nothing, unless you skin it. The mole is a darn nuisance that burrows blindly and aimlessly until trapped. The philatelic species runs true to form as a bore and a nuisance. Sometime ago, he slipped the trap by disclaiming responsibility for substituting No. 460 for 478 in a sale. He professes to be a 'Philatelic broker' who has apparently been carrying on his limited operations at the expense of the large stamp auction houses. Quoting from a few of the reports we learn that 'His returns have always been late and excessive * * *If he doesn't sell them, he returns the stamps.' Another report tells us that 'He practically returns about 90% of the lots and they have all taken him off their list. We are doing likewise.' Another auction house quotes their experience to the effect that the mole returned $270.00 from a total of $300.00 after holding the property between two and three months. He justified the delayed returns with the unreasonable claim that

the lots were not as described. From the information furnished to us it seems that he has operated at the auction houses' expense. He'd chisel on the lots by offering them for sale. If unsuccessful, they would eventually be returned, long after settlement date. This type of operation is a new and clever angle; as long as it can be carried on. But the gravy train is grinding to a stop and it's a painful fact that the mole's worth will have to be tested in a different racket—maybe going to work for a bank or something."

(Plaintiff's Exhibit "7".)

This article was the occasion for appellee's action for libel. A motion to dismiss was interposed to the complaint. It was denied and an answer was then filed. (Tr. 5-8.)

On March 5, 1949, another article written by appellant appeared in the "Weekly Philatelic Gossip". Its text is as follows:

"Gather Around, Dear Reader and enjoy the funniest story ever told. It furnishes proof positive that reporting stampic shenanigans is a risky vocation; especially, when a few gents are allergic to publicity. Pets and Peeves (October 30, 1948) published an item under the heading 'What's a Mole Worth?' Although no name was mentioned, a part-time Boston dealer named Jack E. Molesworth figured out that the shoe fit. So-o-o, said J.E.M. has filed a libel action against us for a paltry $150,000.00 to assuage his financial hurt as an upright, honest, unimpeachable and expert stamp dealer. (Don't laugh yet.) If selling a

counterfeit stamp, if misrepresenting a stamp cataloguing at $40.00 as being one catalogued at $55.00, if unreasonable demands and claims, if allegedly unsatisfactory auction settlements—if IF IF IF all of these are the distinguishing characteristics of an upright, honest, unimpeachable and well-informed stamp dealer, then we apologize. (Laughter, please.) We are reminded of one of several libel suits in recent years. A bozo sued Drew Pearson for libel. When the case was tried, Pearson proved the 'libel' and the bozo landed in the klink. When he saw the light, it was filtered through iron bars. We have two pertinent opinions, (1) this J.E.M. is being used as a tool to intimidate us in our fight for decency in philately, (2) this J.E.M. won't dare to bring the case to trial."

(Tr. 9-10.)

This article was the occasion for the filing of appellee's supplemental complaint for libel.

The answers filed on behalf of appellant are substantially the same. Each answer admits the authorship of the articles but denies that they are false or defamatory or that they exposed the appellee to hatred, ridicule or obloquy or that they injured appellee in his occupation as a philatelic broker and stamp dealer. Both answers deny that appellant knew or had reason to believe them false or that the articles were written with the intention to injure the appellee.

QUESTIONS RAISED ON APPEAL.

Three questions raised on this appeal are:

1. Did the trial Court err in finding as a fact that each publication exposed appellee to hatred, contempt, ridicule and obloquy and that each had a tendency to and did injure him in his business and occupation of a stamp dealer?

2. Did the trial Court err in finding as a fact that each publication was false?

3. Did the trial Court award excessive damages?

Appellee respectfully submits that each and every one of these questions must be answered affirmatively and the decision of the trial Court should be reversed.

SPECIFICATION OF ERRORS.

1. Where a libelous article does not refer to a plaintiff by name, the plaintiff must prove that at least one third person understood that it referred to the plaintiff. The article of October 30, 1948 does not refer to plaintiff by name and no proof was offered to show that any third person understood that it referred to plaintiff. Therefore, the District Court erred in awarding damages based on this article.

2. The evidence does not support the findings that the articles published in the October 30, 1948 issue and March 5, 1949 issue were false.

3. The damages awarded by the Court were excessive.

ARGUMENT.

I.

TO RECOVER FOR A LIBELOUS PUBLICATION IT MUST APPEAR NOT ONLY THAT IT WAS WRITTEN OF AND CONCERNING PLAINTIFF, BUT ALSO THAT IT WAS SO UNDERSTOOD BY SOME THIRD PERSON.

Where a libel omits the name of the person to whom it applies it is necessary for the plaintiff to show that a third person understood that it was the plaintiff who was referred to.

In *Harris v. Zannone,* 93 C. 59, 28 P. 845, the Court states:

> "Whether those who heard the words understood that they had reference to the plaintiff is one of the extrinsic facts by which the application of the defamatory matter to the plaintiff, if controverted, must be established on the trial, but need not be alleged. Their application to the plaintiff is to be established by proof."

In *DeWitt v. Wright,* 57 Cal. 576, the same principle was enunciated:

> "That the matter therein stated is libelous per se, is not disputed. But to enable the plaintiff to maintain an action on it, it is essential not only that it should have been written concerning the plaintiff, but also that it was so understood by at least some one third person."

To the same effect are *National Refining Company v. Benzo Gas Motor Fuel Company,* 20 F. (2d) 763; *Russell v. Kelly,* 44 Cal. 641; *Hearne v. De-Young,* 119 Cal. 679, 52 P. 150; *Dewing v. Blodgett,* 124 Cal. App. 100, 11 P. (2d) 1105; 53 C.J.S. 52 and 53.

"The burden is on the plaintiff to prove that the defamatory imputation referred to him and that it was so understood by others."

Vedovi v. Watson and Taylor, 140 Cal. App. 80, 285 P. 418;

53 *C.J.S.* 315.

"The general rules as to weight and sufficiency of evidence have been applied to evidence to show that the defamatory matter referred to plaintiff. Where it does not appear on the face of the publication that plaintiff was referred to, a preponderance of evidence must be produced to establish that readers generally would understand that the reference was to plaintiff."

Wright v. RKO Radio Pictures (D.C. Mass.), 55 Fed. Supp. 639.

This is also the view of the Restatement of the Law of Torts:

"If the applicability of the defamatory matter to the plaintiff depends upon extrinsic circumstances, it must appear that some person who saw or read it was familiar with the circumstances and reasonably believed that it referred to the plaintiff."

Rest. of Torts, sec. 564.

To satisfy the burden of proof on publication, it is necessary that the plaintiff show not only that the defendant spoke or wrote or otherwise prepared the defamatory matter or made it available to a third person, but also that the third person understood the significance thereof.

"Not only must the plaintiff prove the publication of the defamatory matter, but he must prove that it was published of and concerning him, that is, he must satisfy the Court that it was understood as intended to refer to himself and must convince the jury that it was so understood."

Rest. of Torts, sec. 613 (d).

It is immediately apparent that the article of October 30, 1948 does not refer to the plaintiff by name. (Plaintiff's Exhibit 7.) The Honorable District Court in the trial of the case conceded that this was an anonymous article which did not identify any person.

"The Court. That is all. You may step down. I want to ask you one question, if you will come back. I notice that a rather worthy purpose is stated in the editorial page of your column and as to its purposes.

The Witness. Yes, sir.

The Court. To eliminate trickery and unfair dealings in the business?

The Witness. That is true, sir.

The Court. How would you possibly accomplish that by writing an anonymous article about——

The Witness. You mean the first article?

The Court. What possible good could you do the industry by writing an anonymous article that nobody would know who you were talking about?

The Witness. They correct their methods of doing business. They would change their ways of doing business and I wouldn't have to bother with them any more."

(Tr. 135.)

Since the plaintiff is not described or identified on the face of the article it was incumbent upon him to prove that some third person understood that he was the party referred to.

That fact must be proved by substantial evidence. *Memphis Commercial Appeal, Inc. v. Johnson,* 96 F. (2d) 672. This the plaintiff failed to do. There is not a word in the record that indicates that any person knew that the article of October 30, 1948, referred to plaintiff. On but one occasion did plaintiff attempt to show that any person understood that the article of October 30, 1948, referred to him. On the direct examination of the witness Joseph B. Abrams, Esq., the following testimony was elicited:

> "Q. You are familiar with the two articles which are the subject matter of this action?
>
> A. Yes, sir.
>
> Q. In your dealings in the stamp fraternity since the publication of those articles, have those articles been the subject matter of discussion in the fraternity?
>
> A. They have.
>
> Q. Where have you discussed, or where have these articles been called to your attention, if any place?
>
> A. At dealers' offices in Boston, and at the stamp convention that was held in Boston about three weeks ago.
>
> Q. What type or branch of the business, members belonging to what branch?
>
> A. Both collectors and dealers have discussed the Molesworth articles, as well as this case. They have created a great deal of comment and talk in the field. In fact, it has almost become a 'cause

> celebre' if you will pardon the French, Your Honor."
>
> (Tr. 32.)

On its face this testimony does not establish even by innuendo that there was knowledge in any third person that the article of October 30, 1948, referred to appellee.

That the plaintiff knew that he was the subject of the article or that defendant intended to write of the plaintiff is not sufficient to establish damages.

In *Northrop v. Tibbles,* 215 F. 99, 131, C.C.A. 407, the Court in commenting upon this point stated:

> "Since the gist of an action for libel is damage to plaintiff's reputation, it is insufficient that plaintiff knew that he was the subject of the article, or that defendants knew of whom they were writing, but it must appear that third persons must have reasonably understood that the article was written of and concerning plaintiff, and that the libelous expressions referred to him."

Inasmuch as there was no evidence to prove that any third person understood that the article of October 30, 1948, referred to the appellee the trial Court's finding that that article injured him in his reputation or occupation was erroneous. The conclusion of law made by the trial Court that appellee was damaged was based on the finding that appellee was injured by both of these articles. Since the appellee did not prove that the article of October 30, 1948 was understood by one third person to refer to him the conclusion is erroneous.

II.

THE TRIAL COURT'S FINDING OF FACT THAT EACH ARTICLE WAS FALSE IS NOT SUPPORTED BY THE EVIDENCE.

The libelous character of the articles which constitute the subject matter of this suit centers about three accusations. They are:

1. That a stamp catalogued as a number 460 was sold for a stamp catalogued as a number 478;

2. That a counterfeit stamp was sold; and

3. That appellee made late and excessive returns.

The Court found that the articles were false. This finding is not supported by the evidence.

Appellee sold a Number 460 stamp for a Number 478 stamp. The catalogue price of a number 478 is $55.00, while the catalogue price of a Number 460 is $40.00. (Tr. 52.)

On cross-examination appellee testified:

"Q. At the time and skipping all this preliminary questioning, Your Honor, with regard to when these two people met, in the interest of time, and getting to the sale of 460 and 478, how are those stamps distinguished, Mr. Molesworth?

A. The stamps are distinguished by the watermark, the absence in one case and the watermark being there in the other case.

Q. When you sold a stamp of a type that has but one distinguishing characteristic, in the conduct of your business were you, or did you, usually make a check——

A. Very definitely.

Q. —as to the characteristic?

A. Very definitely.

Q. I see. Did you make a check in this instance?

A. I believe after purchasing at auction I did, because that is my customary procedure.

Q. However, the stamp went out and was not the stamp you represented it to be, is that correct?

A. That fact is not definitely established, but an expert has stated that in his opinion, it was 460 and not 478 as it was sent out.

Q. So far as you know, the stamp was not the stamp you represented it to be, is that correct?

A. That is correct.

Q. Now, you sold the stamp to Mr. Gerber for a profit?

A. Yes.

Q. You were holding yourself out as a stamp dealer at the time?

A. Yes, I was."

(Tr. 60-61.)

Appellee further testified that a watermark test is the only means of distinguishing these two stamps.

"Q. Will you look at these stamps and tell me what they are?

A. How do you mean, what they are? What catalog number?

Q. Yes.

A. That would be either 460 or 478, depending on the watermark. Both perforate 10.

Q. Can you tell from looking at those which is which?

A. No, they would have to be watermarked."

(Tr. 80-81.)

Appellee testified on direct examination that he never did see a watermark on the stamp sold by him to the appellant.

"Q. You have the 478 in question with you, or don't you?

A. No, I don't have. That stamp was returned to the auctioneer and refund was made.

Q. Would it be easy or difficult to determine whether that stamp is watermarked?

A. It would depend on where the stamp was in the set. The catalog will show this particular stamp was very difficult to determine the watermark, and in fact, I myself never did see a watermark on it."

(Tr. 76.)

Mr. Sankey, a stamp dealer, testified that where a more expensive stamp is distinguishable from a cheaper stamp solely by the presence of a watermark, and where the watermark cannot be seen, it is assumed to be the cheaper stamp and is sold as such. (Tr. 104-105.)

Appellee sold a stamp with a counterfeit cancellation as stated in the articles of October 30 and March 5th. This was not controverted. (Tr. 77-79; 53.)

Not only did appellee sell a counterfeit stamp but it was sold by him without adequately checking it for authenticity. His testimony is as follows:

"Q. Before the sale of that stamp, did you check it?

A. Yes, I checked it.

Q. How did you check it?

A. I checked it by reference to Scott's U.S. Specialized Catalogue. In that catalogue under 'Confederate Stamps' you will find cancellation imprinted on the page.

Q. Did you feel you had adequate reference material to properly check this stamp at the time you checked it?

A. There is reference material which would have been of value which I did not have.

Q. But you felt at the time that you checked it——

A. May I explain my location at the time this came about? I was on an island in a lake in New Hampshire at the time this came about. Reference material was not readily available.

Q. You were carrying on your business as a stamp dealer, though?

A. That is correct.

Q. Holding yourself out as a stamp dealer?

A. I did and still do."

(Tr. 63-4.)

As to the third charge that the appellee made late and excessive returns, these statements are not libelous and the Court did not consider them so. (Tr. 70.)

It is a well recognized principle of law that proof of the truth of the defamatory charge is a complete defense to civil liability.

16 *Cal. Jur.* 60.

It is not necessary in proving truth as a defense that a defendant prove the literal truth of an allegedly libelous accusation in every detail so long as the imputation is substantially true so as to justify the "gist" or "sting" of the remark.

Dethlefsen v. Stull, 86 C. A. (2d) 499, 195 P. (2d) 56;

Emde v. San Joaquin Central Labor Council, 23 C. (2d) 146, 143 P. (2d) 20, 150 A.L.R. 916.

Nor is the defendant required to justify every word of the defamatory matter, it is sufficient if the "gist" or "sting" of it is justified. Immaterial variances and defects of proof upon minor matters are to be disregarded if the substance of the charge be met.

Tingley v. Times-Mirror Co., 151 C. 1, 89 P. 1097;

Skrocki v. Stall, 14 C.A. 1, 110 P. 957;

Prosser on Torts, Sec. 95, p. 855;

Paris v. N. Y. Times Co., 9 N.Y.S. (2d) 690.

The trend as established by modern cases has been to liberalize the application of this rule, rather than restrict it.

Hearne v. DeYoung, 119 C. 670, 64 P. 576.

In applying these principles of law to the factual situation it is apparent that appellant, not only proved the "gist" of the charge, but the truth of the charge in its entirety.

It was definitely established that a No. 460 was sold for a No. 478 stamp; that appellee sold a counterfeit stamp or a stamp with a counterfeit cancellation; and that he did make a return of $270.00 on a purchase of $300.00. (Deposition of Henry Bedrin, p. 28.)

The transcript shows that the Honorable trial Court felt that truth was not a defense but rather that the writing of the truth required some further justification.

"The Court. That may be true. Maybe this man is not too competent as a stamp dealer, I don't know, but that is not the question we have before us.

Mr. Bloom. More important, there may be 10,000 different kinds of watermarks or conditions of stamps.

The Court. I am not going into the matter as to whether that is a good dealer, but much of an expert he is in the field.

Mr. Giometti. The question, if I may urge it, your Honor, is that he has sold these stamps.

The Court. It may be he made many common mistakes. That is beside the question. The question is whether or not there is any justification for these articles in the press. Every time these columnists don't like somebody isn't any excuse for their breaking forth with this sort of literature. I can't try out whether or not this man, this plaintiff is competent in the mind of someone else with respect to his identification of stamps.

Mr. Giometti. Very well, your Honor.

The Court. I can't see any purpose in going into it. I am not attempting to cut off your examination, but I don't see any point in an examination of the stamps before me in this case. What we have said is sufficient to make a record, so if I am in error you have it in the record.

Mr. Giometti. That is all."

(Tr. 81-82.)

It is respectfully submitted that the truth of the charges has been established by the evidence, therefore the trial Court's finding (Findings Nos. VI, VIII, IX) that the articles were false, constitutes reversible error.

III.

THE DAMAGES AWARDED BY THE TRIAL COURT ARE EXCESSIVE AND NOT SUPPORTED BY THE EVIDENCE.

The record discloses slight, if any, injury to the business of the appellee. Appellee testified that he had a rapidly expanding business but this testimony is in conflict with the figures submitted by him.

He commenced his part time stamp business in September of 1946. His gross volume for the last three or four months of that year was $5000.00. He did not testify to his profit for that year. (Tr. 35.)

In 1947 his gross volume was $15,000.00 and he claimed a net profit of $1,500.00. (Tr. 60.)

In 1948 his gross volume was approximately $20,000.00 and he claimed an approximate net profit of $2,500.00. (Tr. 59.)

In the first seven months of 1949 he testified that his gross volume was $11,000.00. He offered no evidence as to his profit for those seven months. Though he testified generally that his profit ran from 10 to 15% depending on how inventory was valued. (Tr. 35.)

This concrete evidence indicates that his volume for 1946 was as great or greater than 1947. It reveals an increase in 1948 and a slight leveling off in 1949. A continuation of his 1949 business at the same rate as for the first seven months of that year would have meant a gross volume of $18,852 for that year.

This decrease in volume can hardly be attributed to the effect of the articles. The testimony of all wit-

nesses was to the effect that the stamp business was off in 1949. Mr. Sankey, who conducts the largest stamp business in the West testified that business was off 10-20%. (Tr. 101.) Appellee testified that inventory prices declined a minimum of 10% in 1949. Obviously a decline of this nature would occasion a decline in volume. (Tr. 68.)

Joseph B. Abrams, Esquire testified on behalf of appellee that there were sixteen leading auction houses in the United States. (Tr. 29.) Appellee testified that the fourteen leading auction houses had expressed satisfaction with his method of doing business. (Tr. 49.) This testimony is in direct conflict with his testimony that subsequent to the publication of these articles he was unable to purchase the number of stamps by bid that he would ordinarily have been able to purchase. (Tr. 45.)

It must be borne in mind that the appellee was a part time stamp dealer and his principal occupation was that of an assistant credit manager in a bank.

Considering these facts, it must likewise follow that an award of $3000.00 general damages plus $7500.00 punitive damages is excessive and unjustified.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the judgment of the Honorable District Court should be reversed.

Dated, San Francisco, California,
June 9, 1950.

Respectfully submitted,
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Attorneys for Appellant.